

**United States Department of Labor  
Employees' Compensation Appeals Board**

R.R., Appellant	)	
	)	
and	)	Docket No. 21-0296
	)	Issued: December 1, 2021
DEPARTMENT OF THE INTERIOR,	)	
NATIONAL PARK SERVICE, JOSHUA TREE	)	
NATIONAL PARK, Chiraico Summit, CA,	)	
Employer	)	
	)	

*Appearances:*  
Alan J. Shapiro, Esq., for the appellant<sup>1</sup>  
Office of Solicitor, for the Director

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:  
JANICE B. ASKIN, Judge  
PATRICIA H. FITZGERALD, Alternate Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On December 23, 2020 appellant, through counsel, filed a timely appeal from a September 29, 2020 merit decision of the Office of Workers' Compensation Programs (OWCP).

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<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on an appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; see also 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

Pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.<sup>3</sup>

### **ISSUES**

The issues are: (1) whether OWCP properly determined that appellant received an overpayment of compensation in the amount of \$25,106.43 for which he was without fault, because he concurrently received FECA wage-loss compensation and Social Security Administration (SSA) age-related retirement benefits for the period November 6, 2014 through March 28, 2020, without an appropriate offset; (2) whether OWCP properly denied waiver of recovery of the overpayment; and (3) whether OWCP properly required recovery of the overpayment by deducting \$200.00 from appellant's continuing compensation payments every 28 days.

### **FACTUAL HISTORY**

On June 17, 2013 appellant, then a 63-year-old maintenance worker, filed a traumatic injury claim (Form CA-1) alleging that on June 13, 2013 he lost his footing when removing a sewer manhole cover and injured his right shoulder and upper arm while in the performance of duty. Appellant's supervisor noted on the claim form that his retirement coverage was under the Federal Employees Retirement System (FERS).

OWCP accepted the claim for contusion of right scapular region, right shoulder sprain, and right rotator cuff sprain. It paid appellant wage-loss compensation on the supplemental rolls from November 6, 2014 through May 30, 2015, and on the periodic rolls as of May 31, 2015. Effective March 4, 2018, OWCP paid him wage-loss compensation benefits pursuant to a loss of wage-earning capacity determination dated February 28, 2018, based on the constructed position of merchant patroller.

On March 15, 2019 and January 29, 2020 OWCP forwarded SSA a FERS/SSA dual benefits calculation form.

OWCP received a completed FERS/SSA dual benefits calculation form from SSA dated February 19, 2020. SSA advised that effective November 2014 appellant received SSA age-related retirement benefits. It listed his SSA age-related retirement benefit rates with a FERS offset and without a FERS offset from November 2014 through December 2019. Beginning November 2014, the SSA rate with FERS was \$1,497.90 and without FERS was \$1,136.60. Beginning December 2014, the SSA rate with FERS was \$1,523.90 and without FERS was \$1,155.90. Beginning December 2016, the SSA rate with FERS was \$1,540.00 and without FERS was \$1,159.30. Beginning December 2017, the SSA rate with FERS was \$1,571.00 and without FERS was \$1,182.40. Beginning December 2018, the SSA rate with FERS was \$1,615.50 and

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<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the September 29, 2020 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

without FERS was \$1,215.40. Beginning December 2019, the SSA rate with FERS was \$1,640.60 and without FERS was \$1,234.80.

On April 3, 2020 OWCP prepared an overpayment calculation worksheet wherein it noted the calculation of appellant's SSA offset overpayment from November 6, 2014 through March 28, 2020 and computed a total overpayment amount of \$25,106.43. This form indicated that: from November 6 through 30, 2014 appellant received an overpayment in the amount of \$297.77; from December 1 through 31, 2014 appellant received an overpayment in the amount of \$376.09; from January 1 through November 30, 2015 appellant received an overpayment in the amount of \$4,184.18; from December 1, 2015 through November 30, 2016 appellant received an overpayment in the amount of \$4,585.05; from December 1, 2016 through November 30, 2017 appellant received an overpayment in the amount of \$4,580.95; from December 1, 2017 through November 30, 2018 appellant received an overpayment in the amount of \$4,676.01; from December 1, 2018 through November 30, 2019 appellant received an overpayment in the amount of \$4,814.39; and from December 1, 2019 through March 28, 2020 appellant received an overpayment in the amount of \$1,591.98.

On April 6, 2020 OWCP issued a preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$25,106.43 had been created because appellant concurrently received SSA age-related retirement benefits from November 1, 2014 through March 28, 2020 and FECA wage-loss compensation without appropriate offset. It determined that he was without fault in the creation of the overpayment. OWCP requested that appellant submit a completed overpayment recovery questionnaire (Form OWCP-20) to determine a reasonable payment method, and advised him that he could request waiver of recovery of the overpayment. It further requested that he provide supporting financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records to support income and expenses. Additionally, OWCP further provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoument hearing.

In an April 15, 2020 letter, OWCP informed appellant that it had determined that he was in receipt of FERS/SSA dual benefits. Thus, appellant's FECA wage-loss compensation would be adjusted based on the FERS portion of SSA benefits that are attributable to federal service, and his new net FECA benefit after the SSA offset would be \$825.12 every 28 days.

On April 15, 2020 appellant requested a prerecoument hearing regarding possible waiver of recovery of the overpayment before a representative of OWCP's Branch of Hearings and Review. He noted that he only collected workers' compensation benefits and Social Security and had relied on counsel's advice that it was proper and legal. Appellant further advised that he was underpaid as his compensation had been reduced to almost half. On the Form OWCP-20 completed on April 26, 2020, he reported that his total monthly income was \$2,321.12, and his monthly expenses totaled \$2,259.00. Appellant further noted cash on hand of \$200.00 and a checking account balance of \$50.00. No financial documentation was submitted.

On May 28, 2020 an OWCP hearing representative conducted a preliminary review and found the case not in posture for the hearing. The hearing representative set aside OWCP's April 6,

2020 preliminary overpayment determination, finding that clarification regarding the overpayment start date and an explanation of how the total overpayment was calculated was necessary.

On June 2, 2020 OWCP issued a new preliminary overpayment determination, finding that an overpayment of compensation in the amount of \$25,106.43 had been created because appellant received SSA age-related retirement benefits from November 6, 2014 through March 28, 2020 as part of an annuity under FERS concurrently with FECA wage-loss compensation without appropriate offset. It explained that the overpayment commenced on November 6, 2014, the date his FECA benefits began. OWCP also provided a detailed computation of how the overpayment was created. It determined that appellant was without fault in the creation of the overpayment. OWCP requested that he submit a completed Form OWCP-20 to determine a reasonable repayment method, and advised him that he could request waiver of recovery of the overpayment. It further requested that appellant provide supporting financial documentation, including copies of income tax returns, bank account statements, bills and canceled checks, pay slips, and any other records, which support income and expenses. Additionally, OWCP further provided an overpayment action request form and notified appellant that, within 30 days of the date of the letter, he could request a telephone conference, a final decision based on the written evidence, or a prerecoupment hearing.

On June 12, 2020 appellant requested a prerecoupment hearing regarding possible waiver of recovery of the overpayment before an OWCP hearing representative.

In a July 9, 2020 letter, OWCP's hearing representative requested that appellant complete a Form OWCP-20 and provide supporting financial documentation so that she could consider the question of waiver or determine a reasonable rate of recovery of the overpayment.

On August 26, 2020 OWCP received a completed Form OWCP-20 dated an August 25, 2020. Appellant reported that his total monthly income was \$2,321.12, which included \$1,496.00 from SSA and FECA wage-loss compensation benefits of \$825.12. He indicated total monthly expenses of \$1,974.70 and also noted that his expenses included partial financial support for his girlfriend. Appellant indicated that he had \$100.00 cash on hand with a negative checking account balance. He also indicated that there was no change in his circumstances, which affected his monthly payment. Appellant attached financial information including credit card bills, utility bills for his address, car loan and auto insurance bills, and bank statements.

In an August 25, 2020 affidavit included with appellant's completed Form OWCP-20, appellant's girlfriend clarified that she was actually his fiancée and that he paid for her groceries and electricity. Two electric bills addressed in her name at an address separate from appellant's noted charges of \$221.66 for July 2020 and \$232.48 for June 2020.

A telephonic hearing was held on August 26, 2020.

By decision dated September 29, 2020, the hearing representative finalized the preliminary overpayment determination, finding that appellant had received an overpayment of compensation in the amount of \$25,106.43 for the period November 6, 2014 through March 28, 2020, because it failed to offset his FECA wage-loss compensation payments by the portion of his SSA age-related retirement benefits that were attributable to his federal service. She further found that he was

without fault in the creation of the overpayment, but denied waiver of recovery of the overpayment because the evidence of record failed to establish that recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The hearing representative required recovery of the overpayment by deducting \$200.00 from appellant's continuing compensation payments every 28 days.

### **LEGAL PRECEDENT -- ISSUE 1**

Section 8102(a) of FECA provides that the United States shall pay compensation for the disability of an employee resulting from personal injury sustained while in the performance of his or her federal employment.<sup>4</sup> Section 8116 limits the right of an employee to receive compensation. While an employee is receiving compensation, he or she may not receive salary, pay, or remuneration of any type from the United States.<sup>5</sup> When an overpayment of compensation has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by the Secretary of Labor by decreasing later payments to which the individual is entitled.<sup>6</sup>

Section 10.421(d) of FECA implementing regulations requires that OWCP reduce the amount of compensation by the amount of SSA age-based benefits that are attributable to federal service of the employee.<sup>7</sup> FECA Bulletin No. 97-09 provides that FECA benefits have to be adjusted for the FERS portion of SSA benefits because the portion of the SSA benefit earned as a federal employee is part of the FERS retirement package, and the receipt of FECA benefits and federal retirement concurrently is a prohibited dual benefit.<sup>8</sup>

### **ANALYSIS -- ISSUE 1**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$25,106.43 for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period November 6, 2014 through March 28, 2020, without an appropriate offset.

The record supports that appellant received FECA wage-loss compensation benefits while also receiving SSA age-related retirement benefits beginning November 6, 2014. The information provided by SSA established that appellant had received SSA age-related retirement benefits that were attributable to his federal service commencing November 6, 2014. Thus, the record establishes fact of overpayment.<sup>9</sup>

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<sup>4</sup> 5 U.S.C. § 8102(a).

<sup>5</sup> *Id.* at § 8116.

<sup>6</sup> *Id.* at § 8129(a).

<sup>7</sup> 20 C.F.R. § 10.421(d); *see T.B.*, Docket No. 18-1449 (issued March 19, 2019); *L.J.*, 59 ECAB 264 (2007).

<sup>8</sup> FECA Bulletin No. 97-09 (February 3, 1997).

<sup>9</sup> *M.R.*, Docket No. 20-1622 (issued June 30, 2021).

To determine the amount of the overpayment, the portion of the SSA age-related retirement benefits that were attributable to federal service must be calculated. OWCP received documentation from SSA with respect to appellant's SSA age-related retirement benefit rates that were attributable to federal service, commencing November 6, 2014. SSA provided its age-related retirement benefit rates with FERS and without FERS for specific periods November 6, 2014 through March 28, 2020. OWCP provided its overpayment calculations for each relevant period based on SSA's worksheet and determined that he received a total overpayment in the amount of \$25,106.43. The Board, thus, finds that appellant received prohibited dual benefits for the period November 6, 2014 through March 28, 2020 totaling \$25,106.43.

### **LEGAL PRECEDENT -- ISSUE 2**

Section 8129(b) of FECA provides: "Adjustment or recovery [of an overpayment] by the United States may not be made when incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of this subchapter or would be against equity and good conscience."<sup>10</sup>

Recovery of an overpayment will defeat the purpose of FECA when such recovery would cause hardship to a currently or formerly entitled beneficiary because the beneficiary from whom OWCP seeks recovery needs substantially all of his or her current income, including compensation benefits, to meet current ordinary and necessary living expenses, and the beneficiary's assets do not exceed a specified amount as determined by OWCP.<sup>11</sup> An individual is deemed to need substantially all of his or her current income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00.<sup>12</sup> Also, assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent plus \$1,200.00 for each additional dependent.<sup>13</sup> An individual's liquid assets include, but are not limited to cash, the value of stocks, bonds, saving accounts, mutual funds, and certificate of deposits.<sup>14</sup>

Recovery of an overpayment is considered to be against equity and good conscience when an individual who received an overpayment would experience severe financial hardship in attempting to repay the debt or when an individual, in reliance on such payment or on notice that

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<sup>10</sup> 5 U.S.C. § 8129(b).

<sup>11</sup> 20 C.F.R. § 10.436. OWCP's procedures provide that a claimant is deemed to need substantially all of his or her current net income to meet current ordinary and necessary living expenses if monthly income does not exceed monthly expenses by more than \$50.00. Federal (FECA) Procedure Manual, Part 6 -- Debt Management, *Initial Overpayment Determinations*, Chapter 6.400.4a(3) (September 2020). OWCP's procedures further provide that assets must not exceed a resource base of \$6,200.00 for an individual or \$10,300.00 for an individual with a spouse or dependent, plus \$1,200.00 for each additional dependent. *Id.* at Chapter 6.400.4a(2).

<sup>12</sup> *Id.* at Chapter 6.400.4(a)(3); *C.B.*, Docket No. 20-0031 (issued July 27, 2020); *N.J.*, Docket No. 19-1170 (issued January 10, 2020).

<sup>13</sup> *Id.* at Chapter 6.400.4(a)(2) (September 2020).

<sup>14</sup> *Id.* at Chapter 6.400.4(b)(3).

such payments would be made, gives up a valuable right or changes his or her position for the worse.<sup>15</sup>

OWCP's regulations provide that the individual who received the overpayment is responsible for providing information about income, expenses, and assets as specified by OWCP. This information is needed to determine whether or not recovery of an overpayment would defeat the purpose of FECA or be against equity and good conscience. The information is also used to determine the repayment schedule, if necessary.<sup>16</sup>

### ANALYSIS -- ISSUE 2

The Board finds that OWCP properly denied waiver of recovery of the overpayment.

As OWCP found appellant without fault in the creation of the overpayment, waiver must be considered, and repayment is still required unless adjustment or recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience.<sup>17</sup>

As noted, section 10.436 provides that recovery of an overpayment would defeat the purpose of FECA if recovery would cause hardship because the beneficiary (appellant) needs substantially all of his or her income (including compensation benefits) to meet current ordinary and necessary living expenses, and that assets do not exceed the resource base.<sup>18</sup> The evidence of record shows that appellant had monthly income totaling \$2,321.12. Appellant reported total monthly expenses of \$1,974.70, which included expenses for his fiancée's food (\$600.00) and electricity (\$377.14). Under section 8110 of FECA, a fiancée does not qualify as a dependent.<sup>19</sup> Thus, her expenses may not be included in appellant's ordinary and necessary living expenses. Based on appellant's determination of monthly income and monthly expenses provided on the Form OWCP-20, his monthly income of \$2,321.12 exceeded his monthly expenses of \$1,974.70 by \$346.42, which is more than the statutory amount of \$50.00. Thus, appellant has not established that recovery of the overpayment would defeat the purpose of FECA.

The Board further finds that appellant has not established that recovery of the overpayment would be against equity and good conscience because it has not been shown, for the reasons noted above, that he would experience severe financial hardship in attempting to repay the debt, or that a valuable right had been relinquished, or that a position had been changed for the worse in reliance on the payment, which created the overpayment.

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<sup>15</sup> 20 C.F.R. § 10.437(a)(b).

<sup>16</sup> *Id.* at § 10.438(a); *M.S.*, Docket No. 18-0740 (issued February 4, 2019).

<sup>17</sup> 5 U.S.C. § 8129.

<sup>18</sup> *See supra* note 16.

<sup>19</sup> *See* 5 U.S.C. § 8110.

Because it has not been established that, recovery of the overpayment would defeat the purpose of FECA or be against equity and good conscience, the Board finds that OWCP has not abused its discretion by denying waiver of recovery of the overpayment.<sup>20</sup>

### **LEGAL PRECEDENT -- ISSUE 3**

The Board's jurisdiction over recovery of an overpayment is limited to reviewing those cases where OWCP seeks recovery from continuing compensation under FECA.<sup>21</sup>

Section 10.441(a) of OWCP's regulations<sup>22</sup> provides in pertinent part:

“When an overpayment has been made to an individual who is entitled to further payments, the individual shall refund to OWCP the amount of the overpayment as soon as the error is discovered or his or her attention is called to same. If no refund is made, OWCP shall decrease later payments of compensation, taking into account the probable extent of future payments, the rate of compensation, the financial circumstances of the individual, and any other relevant factors, so as to minimize any hardship.”<sup>23</sup>

### **ANALYSIS -- ISSUE 3**

The Board finds that OWCP properly required recovery of the overpayment by deducting \$200.00 from appellant's continuing compensation payments every 28 days.

In determining that appellant could repay the overpayment through \$200.00 deductions from continuing compensation payments, OWCP took into account his financial information, as well as factors set forth in 20 C.F.R. § 10.441 and found that this method of recovery would minimize any resulting hardship, not necessarily eliminate it, while at the same time liquidating the debt in a reasonably prompt fashion.<sup>24</sup> The Board, therefore, finds that OWCP properly required recovery of the overpayment by deducting \$200.00 every 28 days from appellant's continuing compensation payments.

### **CONCLUSION**

The Board finds that OWCP properly determined that appellant received an overpayment of compensation in the amount of \$25,106.43 for which he was without fault, because he concurrently received FECA wage-loss compensation and SSA age-related retirement benefits for the period November 6, 2014 through March 28, 2020, without an appropriate offset, and that OWCP properly denied waiver of recovery of the overpayment. OWCP also properly required

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<sup>20</sup> See *M.R.*, *supra* note 10.

<sup>21</sup> 20 C.F.R. § 10.441; see *M.P.*, Docket No. 18-0902 (issued October 16, 2018).

<sup>22</sup> *Id.* at § 10.441(a).

<sup>23</sup> *Id.*; see *C.M.*, Docket No. 19-1451 (issued March 4, 2020).

<sup>24</sup> See *M.R.*, *supra* note 10.



recovery of the overpayment by deducting \$200.00 from appellant's continuing compensation payments every 28 days.

**ORDER**

**IT IS HEREBY ORDERED THAT** the September 29, 2020 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: December 1, 2021  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board